

March 5, 2007

**DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY**

Appeal

Name of Petitioner: Eugenie Reich

Date of Filing: January 22, 2007

Case Number: TFA-0187

On January 22, 2007, Eugenie S. Reich (Reich) filed an Appeal from a determination issued to her by the FOIA/Privacy Act Group of the Department of Energy (DOE/HQ) on December 18, 2006, in response to a request for documents that Reich submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that DOE expedite the processing of Reich's FOIA request.

I. Background

The FOIA generally requires that documents held by federal agencies be released to the public on request. In the absence of unusual circumstances, agencies are required to issue a response to a FOIA request within 20 working days of receipt of the request. 5 U.S.C. § 552(a)(6)(A)(i). The FOIA also provides for expedited processing of requests in certain cases. 5 U.S.C. § 552(a)(6)(E).

On December 11, 2006, Reich filed a request for "any record that shows the names of the panel members who formed part of the external investigation panel convened by Jim Roberto of ORNL to investigate fraud and research misconduct allegations made through the journal Nature against researchers in the group of Dr. Steve Pennycook (Pennycook) of ORNL during the summer or 2006." Electronic mail message from Reich to DOE/HQ (December 11, 2006). Reich described herself as a journalist and requested a fee waiver. She also requested expedited processing "because of a compelling need for this record, so as to assist with informing the public concerning federal activity in the form of alleged wrong-doing committed by Pennycook and other ORNL researchers using DOE funding." *Id.* Reich stated that the Boston Globe, Knoxville Sentinel and Nature Magazine published articles in December 2006 that revealed the alleged misrepresentation of data by Pennycook and others who worked with him. She voiced suspicion about the panel that investigated Pennycook because the panel members have not been identified, and argued that they may have conflicts of interest. According to Reich, there is the possibility of significant harm to the public interest through the expenditure of tax dollars on fraudulent research. *Id.* at 2. Further, there is a danger that other researchers are relying on Pennycook's allegedly fraudulent data.

On December 18, 2006, the Director of DOE/HQ denied Reich's requests, stating that she had not submitted enough information to support her request for a fee waiver. Letter from Abel Lopez,

Director, DO/HQ, to Reich (December 18, 2006). The office asked her to submit additional information by January 8, 2007. DOE/HQ also denied her request for expedited processing because the Director found that she did not adequately address the requirements for expedited processing. He found that Reich did not establish any threat to the life or safety of an individual that would justify expeditious processing. Further, he concluded that she did not identify any particular urgency that requires the provision of the requested information in an expedited manner.

Reich submitted the requested information and DOE/HQ then granted her request for a fee waiver. On January 22, 2007, Reich submitted this appeal of HQ's denial of expedited processing. Reich asks that OHA order DOE/HQ to expedite the processing of her FOIA request.

II. Analysis

Agencies generally process FOIA requests on a "first in, first out" basis, according to the order in which they are received. Granting one requester expedited processing gives that person a preference over previous requesters, by moving his or her request "up the line" and delaying the processing of earlier requests. Therefore, the FOIA provides that expedited processing is to be offered only when the requester demonstrates a "compelling need," or when otherwise determined by the agency. 5 U.S.C. § 552(a)(6)(E)(i). "Compelling need," as defined in the FOIA, arises in either of two situations. The first is when failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. The second situation occurs when the requester, who is primarily engaged in disseminating information, has an urgency to inform the public about an activity of the federal government. 5 U.S.C. § 552 (a)(6)(E)(v).

Courts have found sufficient exigency to grant expedited processing in situations of an "ongoing public controversy associated with a specific time frame." *Long v. Department of Homeland Security*, 436 F. Supp. 2d 38 (D.D.C. 2006). Requesters have demonstrated urgency in several ways. *See e.g., Washington Post v. Department of Homeland Security*, 459 F. Supp. 2d 61 (D.D.C. 2006) (granting expedited processing based on public need for requested material to inform voters prior to upcoming election); *Gerstein v. CIA*, No. C-06-4643, 2006 WL 3462658 (N.D. Cal. November 29, 2006) (granting expedited processing because of significant interest in quickly disseminating news regarding a subject currently under debate by Congress). *See also Edward A. Slavin, Jr.*, 27 DOE ¶ 80,279 n.2 (2000) (discussing request to expedite documents for upcoming administrative hearing). Courts have denied requests for expedited processing if the requester fails to demonstrate urgency. *See, e.g., Long*, 436 F. Supp. 2d at 43-44 (denying request due to generalized need for information and requester's failure to identify an imminent action); *Electronic Privacy Info. Ctr. v. Department of Justice*, 322 F. Supp. 2d 1 (D.D.C. 2003) (concluding that plaintiff failed to demonstrate urgency because its proffer of 31 newspaper articles concerning the general subject of FOIA request did not make a story a matter of "current exigency").

We contacted Reich to secure additional information regarding her request for expedited processing. She contends that her initial request explained that the research costs to the taxpayer are ongoing,

and total approximately \$100,000 per month. Electronic mail message from Reich to Valerie Vance Adeyeye, OHA (February 15, 2007). In addition, Reich argues that United States scientists are relying on fraudulent research. *Id.* She informed this office that she needs the information in order to prepare an article for publication prior to a March 6, 2007 meeting of the American Physical Society (APS). Memorandum of Telephone Conversation between Reich and Valerie Vance Adeyeye, OHA (February 15, 2007). At that meeting, Dr. Pennycook will be presenting information to a group of scientists, and according to Reich she has an urgent need to disseminate the information regarding the investigation to the general public prior to the meeting.

After reviewing the record of this case, we find that Reich has not established a compelling need for expedited processing of her request. Reich has not made clear that the requested information, if it exists, will not be useful to her if processed within the timeframe of a normal FOIA request. Neither the recent newspaper articles nor the upcoming public address at the APS meeting demonstrate the requisite urgency to endow this request for information with a compelling need for expedited processing. The scientists whom Reich suggests will be the victims of Dr. Pennycook's allegedly fraudulent research are also the citizens most likely to be already familiar with the controversy surrounding his work. Thus we find that Reich has not established any urgency for the release of the material she requested. Accordingly, her Appeal should be denied.

It Is Therefore Ordered That:

- (1) The Freedom of Information Act Appeal filed by Eugenie S. Reich on January 22, 2007, OHA Case Number TFA-0187, is hereby denied.
- (2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William Schwartz
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Office of Hearings and Appeals

Date: March 5, 2007